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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CHICAGO,
Petitioner,

v.

MACEO G. WILLIS, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police to postpone an arrestee's initial judicial appearance for a reasonable period of time to gather evidence relevant to the charging and bail determinations to be made at that appearance.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the City of Chicago, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-13a, is reported at 999 F.2d 284 (7th Cir. 1993). The opinion of the district court granting summary judgment in favor of respondent, App., *infra*, at 14a-34a, is reported at 726 F. Supp. 1118 (N.D. Ill. 1989). The oral opinion of the district court denying the City of Chicago's motion to alter or amend the judgment, App., *infra*, at 35a-39a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1993. Respondent's petition for rehearing was denied on September 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This case involves the constitutionality of a policy of the Chicago Police Department authorizing police officers to delay an arrestee's initial appearance in court when additional investigation is necessary to obtain evidence relating to the charging and bond determinations to be made at that initial appearance. Pursuant to that policy, respondent Maceo G. Willis, Jr. was not taken before a judicial officer as soon as the processing of his arrest for rape was complete. Instead he appeared in court after the police attempted to arrange lineups in order to determine his possible involvement in a series of other rapes.

1. *Willis's arrest.* Sometime between 9:00 and 10:00 a.m. on February 11, 1985, Chicago police officers went to Willis's place of employment, R. 90 at 2; R. 155 at 2, because a rape victim had given the license plate of his car as being that of the man who had assaulted her the previous Saturday, R. 90 at Tab 4. The police then suspected Willis of having committed a number of other rapes

as well, *id.* at Tab 5 & Tab 6 Jones Dep. at 37, based in part on a computerized crime pattern analysis, *id.* at Tab 9; R. 105 at 14. Willis agreed to accompany the officers to Area 3 Violent Crimes Headquarters. *Id.* at 2; R. 155 at 2.

Willis arrived at Area 3 at approximately 11:00 a.m., R. 155 at 3; R. 197-3 at 10. Various police officers questioned him while others contacted a number of rape victims to arrange for them to view Willis in lineups. R. 90 at 2, Tab 6 Jones Dep. at 37. Between 1:15 and 1:30 p.m., Officer Jones prepared an arrest report for Willis. R. 90 at 2-3; R. 155 at 3. At about 2:00 p.m., Officer O'Connor, following standard police procedure, contacted other police units to provide them with Willis's description so that they could determine if he was a suspect in other crimes then under investigation. R. 90 at 3, Tab 8 O'Connor Dep. at 5. Later (between 4:30 p.m. and 7:00 p.m.), Willis was placed in a series of lineups at Area 3, and eight witnesses identified him as a rapist. R. 90 at 3. At approximately 9:00 p.m., an Assistant State's Attorney approved the filing of charges against Willis. R. 90 at 3; R. 155 at 3. Meanwhile, police officers in Area 2 Violent Crime Headquarters identified Willis as a suspect in a series of rapes in that area, based on the information they had received from Officer O'Connor. R. 90 at Tab 18 Mokry Dep. at 21 & Exhs. 4-11.

The processing of Willis's arrest on the charges arising out of the Area 3 police investigation was completed at 4:15 a.m. on February 12, when the results of his fingerprint check were received. R. 90 at 4; R. 155 at 3. The next available court call was scheduled for 9:30 a.m. that day. *Id.* at 4. Willis was not taken to that court call, however, because the police decided to determine whether he had committed the Area 2 rapes as well before charging and bond decisions were made at his initial judicial appearance on the Area 3 rapes. Accordingly, police

officers transported Willis to Area 2 Headquarters at about 12:50 p.m. so that he could be placed in lineups and viewed by victims of the rapes under investigation in Area 2. R. 90 at 4-5. The additional lineups were scheduled to begin at 8:00 p.m. that evening. *Id.* at 5. No lineup was conducted, however, because police were unable to locate enough men similar in appearance to Willis who could appear in a lineup with him. *Id.* at Tab 21 at Ryan Dep. at 9. Instead, the one victim who had come to Area 2 was shown photographs of Willis and a number of other men of similar appearance, and she did not identify Willis as her assailant. *Id.* at 6, 9. Willis was then returned to Area 3 some time after 9:00 p.m. *Id.* at 6.

Willis was taken to the next court call, less than 45 hours after his arrest, at approximately 9:30 a.m. on February 13. R. 151 at 3; R. 169 at 19. The court set bail at $300,000, and Willis was unable to post the bond. R. 90 at 6. Later that day, Willis was indicted by a grand jury and charged with four incidents of rape. *Id.* at 6. On August 19, 1986, Willis was convicted of the aggravated kidnapping and rape of Latanya Whitfield, for which he is now serving a 60-year sentence. *Id.* at 1; R. 155 at 2.

2. *The Chicago Police Department's policy governing post-arrest investigations.* At the time of Willis's arrest, General Order 78-1 established the Chicago Police Department's policy governing the time at which arrestees must be taken to court. R. 90 at 6; R. 155 at 4. Arrestees were generally required to be brought to the first available court call after their processing was completed. R. 90 at 6; R. 155 at 4. The policy permitted an arrestee to be held past the first available court call only in three circumstances—when it was physically impossible to get the arrestee to court; when there was a hold or warrant from another agency; or to continue an investigation pursuant to paragraph C-2 of the General Order. R. 90 at

6-7; R. 155 at 4. Willis was held past the first court call following his processing on the Area 3 arrest pursuant to that paragraph. R. 90 at 7; R. 155 at 4. Paragraph C-2 provided:

> Extended Detention
>
> a. In the event Criminal Investigation Division personnel ascertain that there is a necessity for the detention of an arrestee for a period of time longer than that which might routinely be expected, in order that they may continue the investigation, a request for such detention will be made by the unit commanding officer or the area coordinator to the watch commander of the facility where the arrestee is detained.
>
> b. The watch commander will ordinarily honor such requests and will note in the narrative portion of the Court Sergeant's Permanent Record Copy of the Arrest Report the name of the member making the request, the time the request was received and the reason for such extension of detention, with specifics. The watch commander will place his signature immediately following his entries.
>
> c. In the event the watch commander does not honor such requests, he will submit a report to his commanding officer setting forth the circumstances and the reasons for the denial of such requests.
>
> d. In the event the watch commander denies the request of the Criminal Investigation Division personnel, the investigator will submit a report to his commanding officer to be forwarded to the Chief of the Criminal Investigation Division, setting forth the circumstances of the incident.

R. 90 at Tab 26 at 9.[1]

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[1] As the district court noted, App., *infra*, at 26a n.10, after Willis's arrest, the City revised the General Order in response to an adverse

3. *Proceedings in the district court.* Willis filed this action under 42 U.S.C. § 1983. R. 1. The district court dismissed Willis's claims under the Fifth and Sixth Amendments, his state-law false arrest claims, and his claim that his due process rights were violated by subjecting him to a suggestive lineup. R. 63-64. The parties then filed cross-motions for summary judgment; the district court granted summary judgment in Willis's favor on his post-arrest detention claim, concluding that the City had unconstitutionally detained him between February 11 and 13, 1985. R. 107-08. The district court held paragraph C-2 unconstitutional: "Both on its face and as applied in this situation, Paragraph C-2 violated Fourth Amendment standards by depriving Willis (and others held under like circumstances) of the right to be free from extended detention without determination of probable cause by a neutral and detached judicial officer." App., *infra*, at 26a (footnote omitted).[2] Willis then dismissed

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judicial decision that was later overturned on appeal because the plaintiffs lacked standing to obtain declarative or injunctive relief. See *Robinson v. City of Chicago*, 868 F.2d 959 (7th Cir.), cert. dismissed as to *Doulin* petitioners, 493 U.S. 1012 (1989), cert. denied as to *Robinson* petitioners, 493 U.S. 1035 (1990). This change in the general order neither mooted this case nor detracted from its importance. The revision did not moot the case, first, because Willis sought damages. *See, e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571-72 (1984). Second, the case was not moot because the City revised the general order only as a result of litigation, and even the revised general order continues to permit investigative detention (limited to 24 hours), so the constitutional question presented here arises even under the revised policy. See, *e.g., Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville*, 113 S. Ct. 2297, 2301 (1983). Thus Willis's claim was not mooted, and the decision below bears quite directly on the City's current policy.

[2] The district court denied the City's motion for summary judgment on Willis's claim that he was subjected to unconstitutional conditions of confinement between February 11 and 13, and ordered those claims to be tried. App., *infra*, at 19a-25a. The jury later found against Willis.

his claims against the individual defendants arising from his post-arrest detention. Accordingly, the case proceeded only against the City of Chicago.

The issue of damages was tried to a jury, which awarded Willis nominal damages of $1.00 on his post-arrest detention claim. R. 170. The City filed a timely post-trial motion in which it renewed its argument that paragraph C-2 was constitutional. R. 175. On May 29, 1991, the district court denied that motion. R. 178. The City of Chicago then filed a notice of appeal. R. 183.[3]

4. *The decision of the court of appeals.* The court of appeals agreed with the district court that paragraph C-2 was unconstitutional. The court of appeals acknowledged that under this Court's decisions in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), the Constitution affords the police a reasonable period of time after an arrest within which to bring an arrestee before a judicial officer. App., *infra*, at 6a-7a. The court of appeals also recognized that under *McLaughlin*, periods of less than 48 hours between an arrest and the arrestee's initial judicial appearance are presumptively reasonable. App., *infra*, at 7a. But the court of appeals observed that "[e]ven if the probable cause determination is provided within 48 hours of arrest, however, such a hearing may still violate the Constitution 'if the arrested individual can prove that his or her probable cause determination was delayed unreasonably.'" *Ibid.* (quoting *McLaughlin*, 111 S. Ct. at 1670). In this case, "Willis has demonstrated convincingly the unreasonableness of his prolonged detention." App., *infra*, at 9a.

In the court of appeals' view, the delay occasioned in this case by paragraph C-2 was "certainly analogous" to

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[3] The district court later awarded Willis $139,350.43 in attorney's fees under 42 U.S.C. § 1988. R. 218. The City took a second appeal from that award. R. 219.

a delay occasioned by an effort to gather additional evidence to justify an arrest, which is a type of delay explicitly condemned in *McLaughlin*. App., *infra*, at 9a. The court wrote that "while the status of the Area 2 investigation was certainly relevant to the magistrate's bail determination on the Area 3 offenses, this factor does not justify denying Mr. Willis his prompt hearing." App., *infra*, at 10a (footnote omitted). The court of appeals therefore rejected our argument that paragraph C-2 occasioned only constitutionally permissible delays—permitting the police to gather evidence necessary to making reasonably informed charging and bail decisions at the arrestee's initial judicial appearance. "To the extent that the City now argues that it had a right to hold Mr. Willis until it could build a better case for the denial of bail, it runs afoul of both *Gerstein* and *McLaughlin*." App., *infra*, at 10a.[4]

REASONS FOR GRANTING THE PETITION

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court held that individuals arrested without a warrant must be provided with a prompt judicial determination of the validity of their arrest. See *id.* at 125. The Court recognized that the legitimate interests of law enforcement might be disserved if this requirement injected undue procedural complexity into the criminal justice system, and accordingly left it to the individual States to determine how these hearings should be integrated into their systems of pretrial procedure. See *id.* at 123-24. In *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), the Court elaborated upon the requirements of *Gerstein*, and held

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[4] The court of appeals reversed the district court's judgment awarding attorney's fees to Willis, concluding that under this Court's decision in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), Willis's recovery of only nominal damages could not justify an award of attorney's fees under section 1988. App., *infra*, at 11a-13a.

that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges." *Id.* at 1670.

In this case, Willis received a post-arrest judicial hearing, at which a judicial officer determined that there was probable cause to support his arrest, within 45 hours of his arrest—a period of time deemed presumptively reasonable in *McLaughlin*. But despite the promptness of this hearing, the court of appeals concluded that the City's policy of permitting police officers to complete an investigation when necessary to make informed charging and bail decisions was unconstitutional.

The decision below warrants the plenary review of this Court. It creates a split in the circuits, misapprehends this Court's precedents, and invalidates an investigative practice that is essential if the police are reliably to determine with whom they are dealing prior to his initial judicial appearance, at which critical charging and bail determinations will be made.

1. The court below concluded that the Fourth Amendment forbids "unreasonably prolonged custody without judicial scrutiny so that the police can undertake further investigatory steps that require the presence of the defendant, a presence that cannot properly be required without a prior judicial determination of probable cause." App., *infra*, at 9a. Of course, Willis's custody was not "unreasonably prolonged" because of its duration—he was held less than the period of time considered presumptively reasonable by *McLaughlin*, as the court of appeals acknowledged. App., *infra*, at 7a. Rather, it was the reason for the delay that led to the court's conclusion that Willis's custody was "unreasonably prolonged." The court held that the City's policy of permitting delays in order to complete the investigation necessary to make reason-

ably informed charging and bail decisions was itself unconstitutional—while such investigations are "certainly relevant to the magistrate's bail determination," App., *infra*, at 10a (footnote omitted), "this factor does not justify denying Mr. Willis his prompt hearing." *Ibid.*

In *Kanekoa v. City & County of Honolulu*, 879 F.2d 607 (9th Cir. 1989), cert. denied, 111 S. Ct. 2055 (1991), in contrast, the Ninth Circuit expressed a very different understanding of the Fourth Amendment. In that case, the plaintiffs were arrested, but were not then brought to court as soon as ministerial booking procedures were completed. Because the plaintiffs were intoxicated when arrested, they were held until they were sober enough to be interviewed. After the interviews were completed, the police decided to release the plaintiffs without charges. The plaintiffs contended that Honolulu's policy of holding arrestees until they could be interviewed violated the Fourth Amendment. The Ninth Circuit disagreed. It noted that *Gerstein* permitted an arrestee's judicial appearance to be postponed until the police complete necessary "administrative steps incident to arrest," *id.* at 610 (quoting *Gerstein*, 420 U.S. at 113), and that "this very phrase suggests a somewhat flexible approach to what qualifies as an administrative step." *Ibid.* "As we read *Gerstein*, 'administrative steps' include procedures which provide the police with basic information from the suspect." *Id.* at 611. Accordingly, the court held:

> The fourth amendment does not prohibit the police from investigating a suspect while the suspect is legally detained. Because the police had legitimate reasons for detaining the [plaintiffs], we cannot conclude as a matter of law that the police violated their fourth amendment rights by conducting an investigation while the suspects were in custody.

Id. at 612.[5] Similarly, in *People v. Clark*, 833 P.2d 561

[5] Significantly, the plaintiffs' petition for certiorari in *Kanekoa* appears to have been held pending the Court's decision in *Mc-*

(Cal. 1992), cert. denied, 113 S. Ct. 1604 (1993), the California Supreme Court concluded that the Fourth Amendment permits postponing an arrestee's initial judicial appearance, even after the ministerial booking process has been concluded, so that an interview of the arrestee may be completed. See *id.* at 603.[6]

The Fifth Circuit has recently also approved of limited investigative detention in *United States v. Adekunle*, Nos. 91-2891 & 92-2979 (5th Cir. Sept. 9, 1993) (to be reported at 2 F.3d 559). Adekunle was seized at the border because custom officials reasonably believed that he was smuggling drugs in his alimentary canal. Applying *McLaughlin*, the court held that although Adekunle could be detained until officials could determine whether he had actually ingested illegal drugs, such an investigative detention could not exceed 48 hours. The court upheld Adekunle's detention because, within 48 hours of his initial seizure, Adekunle was brought before a magistrate who found sufficient reason to continue to hold him. *Adekunle* thus squarely upholds detention for investigative purposes as long as it does not exceed 48 hours.

The decision below cannot be reconciled with the Ninth Circuit's decision in *Kanekoa*, the Fifth Circuit's decision in *Adekunle*, or the California Supreme Court's decision in *Clark*. *Kanekoa* squarely holds that if the police have legitimate reasons to hold an arrestee pending the completion of investigatory steps incident to an arrest,

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Laughlin. The petition was then denied on the next order list following the decision in *McLaughlin*.

[6] See also *Sanders v. City of Houston*, 543 F. Supp. 694, 700 (S.D. Tex. 1982) (*Gerstein* permits police to delay arrestee's judicial appearance while they are "completing paperwork, searching the suspect, inventorying property, fingerprinting, photographing, checking for prior record, laboratory testing, interrogating the suspect, verifying alibis, ascertaining similarities to other related crimes, and conducting line-ups."), aff'd mem., 741 F.2d 1379 (5th Cir. 1984).

they may permissibly do so under *Gerstein*. The decisions in *Adekunle* and *Clark* are to the same effect. Here, the Seventh Circuit did not doubt the legitimacy of the law enforcement interest that underlies the City's policy—it expressly agreed that the evidence the police attempted to obtain while they held Willis was relevant to the bail determination to be made at his initial judicial appearance. App., *infra*, at 10a. Indeed, it is quite plain that a policy that facilitates the determination whether an arrestee has committed other crimes in addition to the one for which he was arrested seeks information critical to the charging and bail determinations made at the initial judicial appearance. But the Seventh Circuit nevertheless held that the Fourth Amendment prohibits continued detention "so that the police can undertake further investigatory steps that require the presence of the defendant," App., *infra*, at 9a, a decision squarely at odds with *Kanekoa*, *Adekunle*, and *Clark*. In spite of the legitimate need here for further police investigation prior to an arrestee's initial bail and probable cause hearing, the Seventh Circuit held that the hearing may not await the result of that investigation. Accordingly, the Seventh Circuit has reached a conclusion flatly inconsistent with that of two other circuits and a state supreme court concerning the propriety of continued detention in order to perform those investigatory steps necessary to make informed charging and bail decisions.

2. The Seventh Circuit's decision also fundamentally misapprehends the teachings of *Gerstein* and *McLaughlin*. These decisions permit reasonable delay of an initial hearing—not to exceed 48 hours—when necessary to prepare for an arrestee's initial judicial appearance.

In *Gerstein*, the Court expressly approved of incorporating post-arrest judicial determinations of probable cause "into the procedure for setting bail or fixing other conditions of pretrial release." 420 U.S. at 124. In *McLaughlin*, this Court recognized that combining bail

and probable cause determinations will result in "delays caused by paperwork and logistical problems. Records will have to be reviewed, charging documents drafted, appearance of counsel arranged, and appropriate bail determined." 111 S. Ct. at 1669. Nevertheless, some reasonable delay before an arrestee's initial appearance in court does not violate the Fourth Amendment:

> Plainly, if a probable cause hearing is constitutionally compelled the moment a suspect is finished being "booked," there is no room whatsoever for "flexibility and experimentation by the States." Incorporating probable cause determinations "into the procedure for setting bail or fixing other conditions of pretrial release"—which *Gerstein* explicitly contemplated—would be impossible. Waiting even a few hours so that a bail hearing or arraignment could take place at the same time as the probable cause determination would amount to a constitutional violation. Clearly, *Gerstein* is not that inflexible.

111 S. Ct. at 1668 (citations omitted) (quoting *Gerstein*, 420 U.S. at 123). *Gerstein* and *McLaughlin* thus contemplate some reasonable delay before the initial hearing, delay that can only have been intended to allow the police and prosecution to gather information so that the judicial officer may make an informed bail determination.

Like most jurisdictions, Illinois requires bail to be set at an arrestee's initial judicial appearance.[7] Information

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[7] Twenty-three States (including Illinois), the District of Columbia, and the United States have statutes that combine the arrestee's initial appearance with the bail determination. See 18 U.S.C. § 3142; Fed. R. Crim. P. 5(c); Ala. Code § 15-11-10 (1982); Ariz. R. Crim. P. 4.2(a)(6); Ark. Code Ann. § 16-85-207(b) (Michie 1987); D.C. Sup. Ct. R. Crim. P. 5(c); Fla. R. Crim. P. 3.130(d); Idaho R. Crim. P. 5; 725 ILCS para. 5/109-1 (1992); Ind. Code Ann. § 35-33-8-3.1 (West Supp. 1992); Kan. Stat. Ann. § 22-2901(3) (1988); Ky. R. Crim. P. 3.05(1); La. Code Crim. Proc. Ann. art. 232 (West 1991); Mass. R. Crim. P. 7(a); Mich. Comp. Laws Ann. § 766.5 (West 1982); Minn. R. Crim. P. 4.03(4); Mo. Ann. Stat. § 544.250 (Vernon 1987); Neb. Rev. Stat. § 29-506

relating to an arrestee's background, including whether he has committed offenses other than the one for which he was arrested, is essential if the judicial officer is to be able to apply correctly the considerations governing the setting of bail. Thus, the police must perform some investigation of an arrestee if they are to be prepared for an arrestee's initial judicial appearance. The City's policy authorizing police officers to complete their initial investigation before an arrestee's first judicial appearance produces only that type of delay the Court has recognized will be inevitable, and hence constitutionally reasonable, if bail is to be determined at an arrestee's initial appearance.

While the Seventh Circuit relied on *McLaughlin* to strike down the City's policy reflected in paragraph C-2,

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(1989); Nev. Rev. Stat. Ann. § 171.206 (Michie 1992); N.M. Mun. Cts. R. Proc. 8-202(c); N.C. Gen. Stat. § 15A-511(e) (1988); Okla. Stat. Ann. tit. 22, §§ 264-67 (West 1986); R.I. Sup. Ct. R. Crim. P. 5(c); Vt. R. Crim. P. 5; Va. Code Ann. § 19.2-82 (Michie 1990); Wash. Crim. R. 3.2. Twenty-two additional States require a judicial officer to set bail at the initial appearance of the arrestee but permit the determination of probable cause at a later hearing. See Alaska Stat. § 12.30.020 (1990); Cal. Penal Code § 859(a) (West 1986); Colo. Rev. Stat. Ann. § 16-4-103(1) (West 1986); Conn. Gen. Stat. Ann. § 54-64a (West 1987); Del. Sup. Ct. R. Crim. P. 5(c); Haw. R. Penal P. 10.1; Me. R. Crim. P. 5(b); Md. R. Crim. P. 4-213; Mont. Code Ann. § 46-7-102(2) (1991); N.Y. Crim. Proc. Law § 510.10 (McKinney 1988); N.D. R. Crim. P. 5(b); Ohio R. Crim. P. 5(A); Or. Rev. Stat. § 135.245(1) (1990); Pa. R. Crim. P. 140; S.C. Code Ann. § 17-15-10 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-4-3 (1988); Tenn. R. Crim. P. 5(d); Tex. Code Crim. Proc. Ann. art. 15.17 (West 1993); Utah R. Crim. P. 7(d)(4); W.V. R. Crim. P. 5(c); Wis. Stat. Ann. § 970.02(2) (West 1985); Wy. R. Crim. P. 5. Two States require the examining magistrate to set bail at the initial appearance, but for certain serious crimes, they require that a judge set bail at a later hearing. See Ga. Code Ann. §§ 17-4-26, 17-6-1(c) (1990); N.H. Rev. Stat. Ann. § 596-A:7 (1986). Three States do not have statutes that provide a precise time for the bail determination. See Iowa Code Ann. § 804.22(1) (West 1987); Miss. Code Ann. § 99-3-17 (1987); N.J. Stat. Ann. § 2A:8-26 (West 1987).

nothing in that decision remotely suggests that delay occasioned by the need to obtain information necessary to make charging and bail determinations—at least if it does not exceed 48 hours—violates the Fourth Amendment. In *McLaughlin*, this Court held that the provision of an initial judicial appearance within 48 hours of arrest

> may nonetheless violate *Gerstein* if the arrested individual can prove that his probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.

111 S. Ct. at 1670. The Seventh Circuit acknowledged that the City's policy authorizes postponement of an arrestee's initial judicial appearance for none of the reasons identified as impermissible by *McLaughlin*, but asserted that delay for the purpose of determining whether an arrestee has committed other offenses is "certainly analogous" to delay for the purpose of "gathering additional evidence to justify the arrest." App., *infra*, at 9a. Not only is this conclusion inconsistent with the holdings in *Kanekoa*, *Clark*, and *Adekunle* (delay for the purpose of completing the investigation of the crime for which an individual is arrested—which was at issue in these cases—is no less "analogous" to delay for the purpose of gathering additional evidence to justify the arrest), but it is also incorrect.

McLaughlin's condemnation of delay for the purpose of gathering additional evidence to justify an arrest reflects no more than the long settled rule of Fourth Amendment law that the police may not make an arrest without probable cause in hopes of later finding evidence to justify the arrest. See, *e.g.*, *Dunaway v. New York*, 442 U.S. 200, 218-19 (1979); *Brown v. Illinois*, 422 U.S. 590, 605 (1975). See also *Maryland v. Garrison*, 480 U.S. 79, 85-86 (1987) (same rule governs searches).

But the delay in this case—as in *Kanekoa*, *Clark* and *Adekunle*—was not for the purpose of justifying an arrest. Willis has never claimed, nor did the court below so much as intimate, that Willis's initial arrest was not supported by probable cause or that the police delayed his initial appearance in order to seek evidence to justify his arrest. Rather, the delay here was for the purpose of determining whether Willis had also committed other crimes; if he had, such information would be highly relevant to the charging and bail decisions to be made at his judicial appearance on the crimes for which he was lawfully arrested.[8] Nothing in paragraph C-2 authorizes delay in presenting those who have been unjustifiably arrested to a judicial officer; the policy permits only delay after an arrest supported by probable cause when there is a "necessity . . . to continue the investigation." Thus, the policy permits only reasonable delay that facilitates making accurate charging and bail decisions at the initial appearance. The language in *McLaughlin* on which the Seventh Circuit relied condemns delay when it prolongs an unconstitutional seizure, not delay that facilitates informed charging

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[8] The court of appeals believed that the police could have brought Willis to court sooner, and at that hearing the judicial officer "could have been informed of the status of the Area 2 investigation at the bail hearing and could have factored this consideration into his determination." App., *infra*, at 10a. Such a procedure would still require prosecutors and judges to make charging and bail decisions before all relevant information is available. And in any event, the court of appeals' preference for its own proposed policy does not make the City's policy unconstitutional. The Fourth Amendment does not prohibit all post-arrest delay, but only "unreasonable delay." While the City might bring arrestees to court somewhat sooner under the court of appeals' proposal, the charging and bail decisions made at that time will be correspondingly less reliable because the initial investigation is not yet complete. The City's decision to authorize a bit of delay to increase the information available at the initial hearing was accordingly within the range of constitutional reasonableness allowed under *McLaughlin* and *Gerstein*.

and bail decisions for individuals who have been properly arrested.

3. The question presented by this case is one of considerable importance to law enforcement. As we note above, most jurisdictions require a judicial officer to set bail at an arrestee's initial appearance—a practice expressly approved in *Gerstein* and *McLaughlin*. But if the police are required to take an arrestee to court before they have had an opportunity to do sufficient investigation in order to determine with whom they are dealing, it will be impossible for prosecutors and judges to make reasonably informed charging and bail decisions. Some period of investigation may be necessary to determine an arrestee's true identity and criminal history before a prosecutor or judge can decide—with any reasonable degree of confidence—whether an individual should be admitted to bail.[9] The decision below, however, prevents the authorities from having a fair chance to make an accurate assessment of an arrestee's eligibility for bail (or to exercise prosecutorial discretion to charge in a responsible manner), since the Seventh Circuit requires an arrestee to be taken to court as soon as the ministerial steps in the booking process have been completed, without waiting for the results of an investigation to determine who an arrestee really is, and what else he may have done. And once an arrestee has gone to court and posted bond, it may be too late to undo the damage if subsequent investigation reveals that he is a serious flight risk or danger to the community.

This Court has repeatedly recognized the propriety of basic investigatory steps that follow arrest but precede an arrestee's initial judicial appearance. For example, in

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[9] The serial killer Ted Bundy, for example, was initially arrested for a traffic violation while he was using an alias. It was only through post-arrest investigation that the authorities learned that they had caught a mass murderer. See *Bundy* v. *State*, 471 So. 2d 9, 11-12 (Fla. 1985), cert. denied, 479 U.S. 89[illegible] (1987).

Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court recognized "the acknowledged need for police questioning [of a suspect] as a tool for the effective enforcement of criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved." *Id.* at 225 (citation omitted). In *Kanekoa*, the Ninth Circuit elaborated:

> An interview may inform the police of the suspect's identity, residence, competence, and whether it is safe to release the suspect pending further proceedings. Moreover, an interview may inform the police that the case is no longer worth pursuing. It provides an early opportunity for the suspect to exculpate himself.

879 F.2d at 611. Lineups, which enable the police to learn whether a victim can identify the arrestee as the perpetrator of a crime, have a similar value, and this Court has referred to post-arrest lineups which precede an arrestee's initial judicial appearance as "a routine police investigation." *Kirby v. Illinois*, 406 U.S. 682, 690 (1972) (plurality opinion). Cf. *Patzig v. O'Neil*, 577 F.2d 841, 847 (3d Cir. 1978) (delaying initial judicial appearance of suspected drunk driver to conduct medical tests was reasonable). But in the Seventh Circuit's view, delaying an initial judicial appearance in order to interview an arrestee, place him in a lineup, or otherwise investigate who he is and what he has done, are merely "further investigative steps that require the presence of the defendant, a presence that cannot properly be required without a prior judicial determination of probable cause." App., *infra*, at 9a.

Permitting reasonable post-arrest investigation prior to an arrestee's initial judicial appearance is not an open-ended invitation to police abuse. To the contrary, faithful adherence to *McLaughlin* limits the possibility of abuse, since *McLaughlin* not only requires the police to

have some legitimate reason for any post-arrest delays that occur, but also makes delay for any purpose presumptively unreasonable after 48 hours. At that point, delay is permitted only in case "of a bona fide emergency or other extraordinary circumstance." 111 S. Ct. at 1670. But when, as here, delay does not exceed 48 hours, and is justified by a need to prepare for the arrestee's initial appearance, there is no basis to depart from *McLaughlin*'s presumption of reasonableness.

What is more, the import of the holding below cannot be confined to the particular facts of this case. Because Willis prevailed against the City, and not the individual officers involved in his arrest, the decision below condemns the City's policy and not merely its application to Willis. See *City of Canton v. Harris*, 489 U.S. 378 (1989) (municipality can be held liable only if its policy is unconstitutional or exhibits reckless indifference to constitutional rights). Thus, it is the basic policy of authorizing some investigation prior to an arrestee's initial appearance, and not merely the investigation undertaken in this case, that is at stake.

The decision below strikes down an appropriate investigative practice that enables the authorities to make responsible charging and bail determinations. This decision thus impairs the legitimate interests of law enforcement. Moreover, because a policy authorizing police to perform some additional investigation of an arrestee before his initial judicial appearance—such as interrogations and lineups—is so widely considered to be proper police practice, see, *e.g.*, American Law Institute, *A Model Code of Pre-Arraignment Procedure* § 140.1 (1975), the decision below will no doubt spawn substantial litigation brought by the many thousands of arrestees who have been held for some period of time while their identities and backgrounds are checked, interviews are conducted, or lineups are held. And legal uncertainty is particularly intolerable in this area, since, thousands of

times each day, police across the country face the decision whether to hold an arrestee pending further investigation.[10] The Seventh Circuit's sweeping condemnation of post-arrest investigations presents a question of critical importance to law enforcement, one that will recur throughout the country. Plenary review of the decision below is thus amply warranted.[11]

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[10] What is more, because local governments have no qualified immunity from liability even in cases in which they reasonably believe their policies to be lawful, see *Owen v. City of Independence*, 445 U.S. 622 (1980), challenges to municipal policies will expose municipalities and other units of local governments to damages verdicts in all cases of investigative delay.

[11] On October 4, 1993, the Court granted the petition for certiorari in *Powell v. Nevada*, No. 92-8841. In that case, the police held Powell for more than 72 hours before a *Gerstein* hearing occurred at which a magistrate found probable cause. The Nevada Supreme Court did not doubt that Powell's rights, as explained in *McLaughlin*, had been violated. See *Powell v. State*, 838 P.2d 921, 924 (Nev. 1992). The Nevada court held, however, that *McLaughlin*'s 48-hour rule was not applicable because it should not be accorded retroactive effect. See *id.* at 924 & n.1. The court also held that because Powell had waived his right to remain silent and his right to counsel, he had waived his state-law right to a timely arraignment. See *id.* at 924-25. The petition for certiorari presents the question whether *Griffith v. Kentucky*, 479 U.S. 314 (1987), requires application of *McLaughlin*'s 48-hour rule to an arrest made before *McLaughlin* was decided. See Pet. i, 4-5. The State's Brief in Opposition, although it argued that *McLaughlin* was inapplicable to the speedy arraignment issue on non-retroactivity and waiver grounds, did not deny that *McLaughlin*, if applicable, was violated. See Respondent's Brief in Opposition, No. 92-8841, at 6-9. Thus, in light of the holding below and the State's position in this Court, the case might also present the question what remedy is appropriate for a violation of *McLaughlin*.

Powell does not bear on this case. Neither party in that case has presented to the Court any issue regarding the scope of *Gerstein* and *McLaughlin*'s requirements, and, in any event, in this case the police complied with *McLaughlin*'s 48-hour rule. As we explain above, this case presents a different question—whether the City's policy nevertheless violated the Fourth Amendment because of the reason

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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it permitted the police to hold Willis past the first available court call. That question is not presented in *Powell*, and this petition therefore should not be held for the decision in that case.

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-2528 & 92-1592

MACEO G. WILLIS, JR.,
Plaintiff-Appellee,
v.

CITY OF CHICAGO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 86 C 9589—Milton I. Shadur, *Senior Judge.*

ARGUED NOVEMBER 10, 1992—DECIDED JULY 30, 1993

Before POSNER and RIPPLE, *Circuit Judges,* and CRABB, *Chief District Judge.**

RIPPLE, *Circuit Judge.* Maceo Willis, Jr. was arrested on charges of sexual assault. Pursuant to Chicago Police Department policy, Mr. Willis was held for an extended period of time without a judicial determination of probable cause so that the police could investigate other crimes that they suspected Mr. Willis had committed. Mr. Willis

* The Honorable Barbara B. Crabb, of the Western District of Wisconsin, is sitting by designation.

brought this action against the City of Chicago. He alleged that his constitutional rights had been violated by the City's extended detention policy. The district court granted summary judgment to Mr. Willis and then determined that he was a "prevailing party" under 42 U.S.C. § 1988 and ordered the City to pay Mr. Willis' attorneys' fees. The City of Chicago now appeals from both determinations of the district court. We affirm in part and reverse in part.

I

BACKGROUND

A. *Facts*

On the morning of February 11, 1985, Chicago police officers arrived at Mr. Willis' place of employment and met with Mr. Willis in the personnel office. Based on witness information and a computerized crime pattern analysis, the officers suspected him in connection with a series of aggravated sexual assaults. Although they did not have a warrant for Mr. Willis' arrest, the officers convinced him to return with them to Area 3 Violent Crimes Police Headquarters (Area 3). On the way to the police station, one of the officers advised Mr. Willis of his rights and, once they neared their destination, the officer placed Mr. Willis in handcuffs.

The officers and Mr. Willis reached Area 3 at approximately 11:00 a.m. and the officers began to question him regarding the assaults and to telephone victims to arrange for them to view him in a lineup. During this time, other police units were contacted, including Area 2 Violent Crimes Headquarters (Area 2), so that the police could determine whether Mr. Willis was a suspect in any other crimes. From approximately 4:00 p.m. to 7:00 p.m., Mr. Willis participated in a series of lineups at Area 3. He was identified by numerous witnesses as having committed several acts of aggravated criminal sexual assault. Supported by these identifications, the Assistant State's At-

torney approved filing charges against Mr. Willis. Meanwhile, police officers in Area 2 had determined that Mr. Willis fit the description of a perpetrator of a series of sexual assaults in that section of the city. At approximately 11:00 p.m., Mr. Willis was taken to the District 9 police station lockup. The processing of charges against him was completed at 4:15 a.m. on February 12, 1992, when the results of a fingerprint check were received by the station.

Because February 12 was Lincoln's Birthday, a special holiday court schedule was in effect. The felony court call for arrestees to appear in front of a neutral judicial officer was scheduled for 9:30 a.m. that morning. Although Mr. Willis had already been booked on the charges arising out of the Area 3 police investigation, he was not taken to that court call for a probable cause determination because he was considered a suspect in the additional Area 2 crimes. The police wished to conduct additional investigations into the Area 2 crimes.

In the early afternoon of that same day, Mr. Willis was transported to Area 2 for lineups relating to the assaults in which Area 2 police considered him a suspect. Because the police, however, were unable to find other men similar in appearance to Mr. Willis, the lineups were not conducted. A victim of one of the crimes was instead shown a photo array that included a picture of Mr. Willis; the victim was unable to make a positive identification. No arrest warrant was ever issued against Mr. Willis for any of the Area 2 crimes, and he was never charged with any of those crimes.

On February 13, at approximately 9:30 a.m., Mr. Willis was taken before a neutral judicial officer for a bail hearing. Bail was set at three hundred thousand dollars, which Mr. Willis was unable to post. Later that same day, he was indicted by a grand jury on four counts of aggravated criminal sexual assault.

At the time of Mr. Willis' arrest, the Chicago Police Department's general policy relating to the processing of arrestees was set forth in General Order 78-1. It was the Department's policy to bring arrestees to the first available court call after completion of processing. There were, however, established exceptions to this general rule. Paragraph C-2(a) stated that

> [i]n the event Criminal Investigation Division personnel ascertain that there is a necessity for the detention of an arrestee for a period of time longer than that which might routinely be expected, in order that they may continue the investigation, a request for such detention will be made by the unit commanding officer or the area coordinator to the watch commander of the facility where the arrestee is detained.

R.90, Ex.26 at 9. The City acknowledges that Mr. Willis was held past the February 12 holiday court call pursuant to this extended detention policy so that Mr. Willis' possible involvement in the Area 2 crimes could be investigated.

B. *District Court Proceedings*

On December 10, 1986, Mr. Willis filed a complaint against the City and various police officers, alleging numerous constitutional violations and state law claims. Ultimately, however, Mr. Willis' suit consisted of two issues: (1) whether the City violated his Fourth Amendment [1] rights by detaining him for an undue length of time pursuant to an extended detention policy and prior to receiving a judicial probable cause hearing and (2) whether two of the City's police officers had denied him food and

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[1] Our opinion will refer throughout to the Fourth Amendment rather than to the Fourth and Fourteenth Amendments. Although this is technically imprecise because the Fourth Amendment by itself applies to federal and not state or municipal actors, we shall continue a conventional and convenient practice. *See Marshall v. Allen*, 984 F.2d 787, 789 n.1 (7th Cir. 1993).

the use of a bathroom during a twelve-hour period of his detention.[2] Mr. Willis and the City filed motions for summary judgment on the extended detention issue and the district court granted summary judgment to Mr. Willis. Basing its decision on *Gerstein v. Pugh,* 420 U.S. 103 (1975), the court held that, on its face and as applied, the City's detention policy violated Mr. Willis' Fourth Amendment right to a prompt judicial determination of probable cause. *Willis v. Bell,* 726 F. Supp. 1118, 1124 (N.D. Ill. 1989). The claim regarding the conditions of Mr. Willis' detention was then submitted to a jury.

On May 10, 1991, a jury found in favor of the defendant police officers regarding the conditions of detention. The jury also awarded nominal damages of one dollar (the minimum amount it could award) to Mr. Willis for the unconstitutional length of detention. Three days later, the Supreme Court decided *County of Riverside v. McLaughlin,* 111 S. Ct. 1661 (1991), in which the Court gave guidance for determining when a delay in receiving a *Gerstein* probable cause hearing is unconstitutional. The City filed a motion to vacate judgment based on the rationale in *McLaughlin,* but the district court concluded that the Supreme Court's decision did not support the extended detention policy and thus *McLaughlin* did not change the outcome of Mr. Willis' case.

Subsequently, Mr. Willis contended that he was a "prevailing party" as defined under 42 U.S.C. § 1988 for purposes of an award of attorneys' fees under that statute. While the City did not object to the calculation of the fees, it did object to their imposition. The court found Mr. Willis to be a prevailing party and, after independently reviewing the fees and noting that they had been discounted to take into account claims upon which Mr. Willis had not prevailed, the district court found Mr. Willis' re-

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[2] The jury found for defendants on this claim and the resolution of this issue is not in contention on this appeal.

quested figure to be reasonable. On February 10, 1992, the court awarded $139,350.43 in attorneys' fees to Mr. Willis. The City now appeals both the district court's finding of unconstitutional detention and the award of attorneys' fees. This court has consolidated the City's appeals.

II

ANALYSIS

A. *The Constitutionality of Mr. Willis' Extended Detention*

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court held that, following a warrantless arrest, the Fourth Amendment requires a prompt judicial determination of probable cause before an arrestee may be subjected to extended pretrial detention. This holding acknowledges that prolonged pretrial detention occasions serious interference with liberty rights. *Id.* at 114. A judicial assessment of probable cause is thus necessary to guard against illegitimate interference with those rights. In *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1668 (1991), the Court noted that *Gerstein* sought to balance the law enforcement interest in taking suspected criminals into custody, even when there has been no opportunity for a prior judicial determination of probable cause, against the possibility that detention founded upon an incorrect suspicion of wrongdoing may adversely affect the arrestee's job, income, and family relationships. Thus, *Gerstein* was a " 'practical compromise' between the rights of individuals and the rights of law enforcement." *McLaughlin*, 111 S. Ct. at 1668.

In *McLaughlin*, the Supreme Court defined the "promptness" requirement of *Gerstein*. The Court acknowledged that, because *Gerstein* allows the incorporation of judicial probable cause determinations into other pretrial procedures, some types of delay are simply unavoidable. *McLaughlin*, 111 S. Ct. at 1669. Thus, the regular

problems confronting police when processing arrestees through the overcrowded criminal justice system may give rise to delays that are not deemed to violate the Fourth Amendment. *Id. McLaughlin* stated that a policy providing for a judicial probable cause determination within 48 hours of a suspect's arrest will generally satisfy the *Gerstein* promptness requirement. *Id.* at 1670. Even if a probable cause determination is provided within 48 hours of arrest, however, such a hearing may still violate the Constitution "if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." *Id.; accord Bostic v. City of Chicago,* 981 F.2d 965, 968 (7th Cir. 1992), *cert. denied,* 61 U.S.L.W. 3864 (U.S. June 28, 1993) (No. 92-1746).

Some delays are unavoidable because of the practical realities of the criminal justice system. "[T]ransporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, [and] obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest" are all examples of situations in which delays in presentment are reasonable. *McLaughlin,* 111 S. Ct. at 1670. While delays caused by the realities of the criminal justice system may be considered reasonable ones, the Court also noted that some delays are patently unreasonable. "[D]elays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake" are all examples of illegitimate reasons to delay a judicial determination of probable cause. *Id.*

In the present case, the Chicago police held Mr. Willis for approximately 45 hours before he was given a probable cause hearing. *See* R.102 at 5. As noted above, such a delay generally complies with *Gerstein.* The parties here, however, disagree as to whether the delay in presenting Mr. Willis to a magistrate for a probable cause determina-

tion, pursuant to the extended detention provision, can be considered a reasonable delay under the teaching of *McLaughlin*.

Mr. Willis nevertheless argues that the delay in bringing him before a judicial officer was unreasonable. He notes that *McLaughlin* tolerates only administrative or procedural delays that are reflective of the practical realities of the criminal justice system. Mr. Willis stresses that the delay in his case was not caused by such concerns. Mr. Willis was processed on the Area 3 charges in time to be presented at the next available court hearing, the February 12, 9:30 a.m. holiday court call. Instead, under the extended detention policy, the police chose to delay his initial hearing in order to conduct an investigation on a different set of crimes than those for which he had been arrested. Because the City subjected him to a "self-induced, non-administrative" delay, Mr. Willis asserts that the delay was unreasonable and thus violated the Fourth Amendment. Appellee's Br. at 16.

In reply, the City maintains that the delay occasioned by Paragraph C-2 of the detention policy was a reasonable investigative delay. It notes that Mr. Willis was not held beyond the February 12 court call so that the Area 3 crimes for which he had been arrested could be investigated further. *McLaughlin* would clearly prohibit such a presentment delay because it would be for the purpose of gathering evidence to justify the arrest. 111 S. Ct. at 1670. Here, however, the City claims that the delay was not improper because the police were not attempting to buttress a probable cause determination on the Area 3 charges.

Instead, the City contends, investigation of other separate crimes is a reasonable cause for delay. Detaining Mr. Willis to investigate the alleged Area 2 crimes was simply an administrative step, the City asserts, necessary to ensure that the prosecutor and the magistrate made well-informed

charging and bail decisions. *See* Appellant's Br. at 20. Had the Area 2 lineup taken place or had the Area 2 witness identified Mr. Willis from the photo array, such information would have been relevant to the charging decision, bail determination, and potential conditions for release. The City asserts that, similar to post-arrest interviews designed to elicit an arrestee's name and address, investigation of other alleged crimes is an administrative step in the arrest process to garner necessary information about an arrestee. Therefore, it contends, the delay caused by such investigation is reasonable.

We believe that the Supreme Court's decision in *McLaughlin* makes Mr. Willis' contentions more tenable than the arguments of the City and that, unlike the plaintiff in *Bostic*, Mr. Willis has demonstrated convincingly the unreasonableness of his prolonged detention. Processing on the Area 3 charges for which he had been arrested was completed in ample time for Mr. Willis to appear at the February 12 court call. The parties agree that he was detained solely to permit the police to place him in lineups relating to other uncharged crimes. The arrest yet to be judicially scrutinized was used as an opportunity to build a separate case against him. While such delay is not explicitly mentioned as unreasonable in *McLaughlin*, the Court's opinion, in our view, leaves little doubt as to the appropriate course. The Court condemned delays for the purpose of "gathering additional evidence to justify the arrest" as unreasonable and thus determined them to be an illegitimate basis for postponing a judicial determination of probable cause. 111 S. Ct. at 1670. The delay to which Mr. Willis was subjected is certainly analogous. In both circumstances, a person is subjected to unreasonably prolonged custody without judicial scrutiny so that the police can undertake further investigatory steps that require the presence of the defendant, a presence that cannot properly be required without a prior judicial determination of probable cause.

Contrary to the City's assertions, we do not believe that the delay occasioned here pursuant to the extended detention policy can be characterized fairly or realistically as a mere administrative step resulting from the practical realities of the criminal justice system. If, as the City now contends, the police already had probable cause for the Area 2 lineups, that information could have been provided to the magistrate along with the information furnished with respect to the Area 3 offenses for which Mr. Willis had been arrested.[3] In any event, while the status of the Area 2 investigation was certainly relevant to the magistrate's bail determination[4] on the Area 3 offenses, this factor does not justify denying Mr. Willis his prompt hearing. The magistrate could have been informed of the status of the Area 2 investigation at the bail hearing and could have factored this consideration into the determination. To the extent that the City now argues that it had a right to hold Mr. Willis until it could build a better case for the denial of bail, it runs afoul of both *Gerstein* and *McLaughlin*.

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[3] On appeal, the City also argues that, even before the proposed Area 2 lineups, it had probable cause for the arrest of Mr. Willis for those crimes and that, therefore, it cannot be said that he was being held for a crime on which the police lacked probable cause. This argument has a distinct circular quality to it. The whole point is that there never was a judicial determination of probable cause with respect to these crimes. In any event, the City never makes clear the basis for its post facto assertion that probable cause existed before the victim's attempted identification.

[4] We cannot accept the City's suggestion that the extended detention policy was written to permit delay only when it was necessary to make informed charging and bail decisions. The very broad language of the policy belies such an interpretation. It allows detention of an arrestee for an unspecified period whenever Criminal Investigation Personnel believe that an investigation ought to continue.

B. *Availability of Attorneys' Fees under 42 U.S.C. § 1988*

The district court found that Mr. Willis was a "prevailing party" under 42 U.S.C. § 1983 and that he was thus entitled to attorneys' fees under § 1988 of that title. The court approved Mr. Willis' fee petition in its entirety. However, while this case has been under submission in this court, the Supreme Court decided *Farrar v. Hobby*, 113 S. Ct. 566 (1992), which clarified the status of a "prevailing party" for purposes of § 1988 attorneys' fees and delineated the factors that should be considered in fixing a reasonable fee award.

In *Farrar*, the defendants were found guilty of violating the plaintiffs' constitutional rights, but the jury did not find that the plaintiffs had suffered any compensable injury from these violations. *Id.* at 570. Instead of receiving their requested seventeen million dollars in damages, the plaintiffs were awarded nominal damages of one dollar. They then sought attorneys' fees under § 1988 as prevailing parties. In its review, the Supreme Court held that a plaintiff is a prevailing party when the actual relief "on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 573. Because the entry of a nominal damages award is neither the entry of judgment for the defendant on the merits nor a declaration of the defendant's legal immunity to suit, the Court held that a plaintiff who wins nominal damages is a prevailing party under § 1988. *Id.*

Despite the determination that the plaintiff in *Farrar* was a prevailing party, the Court stated that the overall success of the plaintiff's claim, however, is the most critical factor in determining the reasonableness of a fee award. "Although the 'technical' nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988." *Id.* at 574. Because the

plaintiffs in *Farrar* had gained little more than a moral victory instead of the seventeen million dollars in damages that they had requested, the Supreme Court held that the only reasonable fee for such a judgment is no fee at all. The Court stated that

> [i]n a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury. . . . When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.

Id. at 575 (citation omitted). Thus, although the *Farrar* plaintiffs were prevailing parties, they were not awarded attorneys' fees.

We believe that the result in *Farrar* must control our resolution of Mr. Willis' claim for attorneys' fees. In Count II of his Third Amended Complaint, Mr. Willis sought actual damages and one million dollars in punitive damages from the City for its violation of his Fourth Amendment rights. Although he prevailed on his constitutional claim, the jury awarded Mr. Willis only one dollar in nominal damages. Thus, as noted in *Farrar*, "[t]his litigation accomplished little beyond giving petitioners the moral satisfaction of knowing that a federal court concluded that their rights had been violated in some unspecified way." *Id.* at 574 (citation omitted). While courts must certainly also take into consideration other factors, including the significance of the holding to other litigants and to the growth of the law, *see Farrar*, 113 S. Ct. at 578, Mr. Willis' litigation did not cause the Police Department to rescind the extended detention policy. Mr. Willis filed suit on December 10, 1986, approximately six months after the Department had invalidated the policy.[5] Thus, his legal action cannot be

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[5] The district court noted in its opinion that the extended detention policy had been rescinded in June 1986. *Willis v. Bell*, 726

deemed to have instigated the revocation of the extended detention policy. *Cf. Pembroke v. Wood County,* 981 F.2d 225, 231 n.27 (5th Cir. 1993) (holding that although plaintiffs received no money damages, their suit caused the improvement of prison conditions and thus they were entitled to attorneys' fees), *cert. denied,* 61 U.S.L.W. 3831 (U.S. June 14, 1993) (No. 92-1744). Mr. Willis' victory was limited to a recognition that his constitutional rights had been violated by the City and to a nominal award of one dollar. *Farrar* requires that we reverse the district court's award of attorneys' fees.

Conclusion

For the foregoing reasons, we affirm the district court's decision in part and we reverse in part.

AFFIRMED IN PART AND
REVERSED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

F. Supp. 1118, 1124 n.16 (N.D. Ill. 1989). The rescission may have been in response to earlier litigation also regarding the constitutionality of the policy. *See Robinson v. City of Chicago,* 868 F.2d 959, 962 (7th Cir. 1989), *cert. dismissed,* 493 U.S. 1012 (1989), and *cert. denied,* 493 U.S. 1035 (1990).

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

No. 86 C 9589

MACEO G. WILLIS, JR.,
Plaintiff,

v.

ERNEST BELL, *et al.*,
Defendants.

Dec. 4, 1989

MEMORANDUM OPINION AND ORDER [1]

SHADUR, District Judge.

Maceo Willis ("Willis") has sued several City of Chicago ("City") police officers (collectively "Officers"),[2]

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[1] This opinion deals with simultaneously-briefed cross-motions for summary judgment. To avoid confusion in referring to the six legal memoranda, they will be cited this way:

1. Those addressing plaintiff's motion will be cited "P.Mem.—," "D.Ans.Mem.—" and "P.R.Mem.—."

2. Those addressing defendants' motion will be cited "D.Mem.—," "P.Ans.Mem.—" and "D.R.Mem.—."

As for the motions themselves, they will be cited simply "P.Mo.—" and "D.Mo.—."

[2] Defendant Officers are Ernest Bell ("Bell"), Leonard Kukulka ("Kukulka"), A. Jones, Jr. ("Jones") and T. O'Connor ("O'Connor"). Willis' Third Amended Complaint (the "Complaint") identifies Kukulka as "Leonard Kukula" throughout. Because defendants' answer and memoranda consistently spell his name with three "ks," this opinion adheres to that spelling.

Chicago Police Superintendent LeRoy Martin ("Martin")[3] and City itself under 42 U.S.C. § 1983 ("Section 1983"), claiming numerous violations of Willis' constitutional rights incident to his arrest and detention by Officers from February 11 to 13, 1985.[4] In May 1988 all defendants moved for summary judgment under Rule 56. This Court's May 27, 1988 memorandum opinion and order (the "Opinion," 687 F.Supp. 380)[5] dismissed several of Willis' claims on grounds stated there.[6] Only two of

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[3] See Appendix for an explanation of why this Court hereby orders the substitution of Martin for former Superintendent Fred Rice (originally named as a defendant here) pursuant to Fed.R. Civ.P. ("Rule") 25(d)(1). This opinion will hereafter refer only to Martin.

[4] Initially the Complaint also included a pendent state law claim for alleged violations of the Illinois Code of Criminal Procedure, Ill.Rev.Stat. ch. 38, ¶¶ 100-1 to 125-4. In its first written opinion in this case (669 F.Supp. 229, 231-34 (N.D.Ill.1987)) this Court declined to exercise pendent jurisdiction over the Illinois claim because Illinois law was unsettled.

[5] Citations to the Opinion will take the form "Opinion at —," referring only to the F.Supp. page number without repeating the volume number.

[6] When the Opinion was written, the preexisting case law in this Circuit—though not entirely uniform in that respect—had given a restrictive reading to the availability of Section 1983 for certain kinds of prisoner claims in light of the Supreme Court's decisions in *Preiser v. Rodriguez*, 411 U.S. 475, 494, 499 n. 14, 500, 93 S.Ct. 1827, 1839, 1841 n. 14, 1841, 36 L.Ed.2d 439 (1973) and *Wolff v. McDonnell*, 418 U.S. 539, 554-55, 94 S.Ct. 2963, 2973-74, 41 L.Ed.2d 935 (1974). This Court therefore adhered, as it was bound to do, to the teaching of *Hanson v. Heckel*, 791 F.2d 93, 96 (7th Cir. 1986) (per curiam) as reconfirmed in *Crump v. Lane*, 807 F.2d 1394, 1400-01 (7th Cir.1986)—see Opinion at 384. Since then, however, *Viens v. Daniels*, 871 F.2d 1328 (7th Cir. 1989) has not only noted the "significant tension between the Supreme Court's decisions in *Preiser* and *Wolff*, on the one hand, and our own decisions in *Hanson* and *Crump*, on the other" (*id.* at 1333) but has materially limited the scope of the doctrine announced in the latter two cases (*id.* at 1333-34). It is therefore in order for the parties to revisit the holdings in Opinion at 384-85 in view of *Viens'* "new

Willis' claims—those challenging the length and conditions of his detention before he received a hearing—survived that first round of attack.

Now Kukulka and O'Connor have moved for summary judgment on Count I of Willis' Third Amended Complaint ("Complaint") concerning the conditions of Willis' detention. City and Martin have moved for summary judgment on Count II of the Complaint concerning the length of Willis' detention before he received a hearing. Willis has filed a cross-motion for summary judgment on Count II only. For the reasons stated in this memorandum opinion and order:

1. Kukulka's and O'Connor's motion is denied.

2. City's and Martin's motion is denied and Willis' corresponding cross-motion is granted.

Facts[7]

Opinion at 383 set out a brief factual background—all that was needed in the context of the then-pending motion. Because the current Rule 56 motions concern a considerably narrower set of issues and stand on a different footing, it is necessary to recapitulate the now-relevant facts.

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look," to see whether one or more of Willis' claims dismissed in the Opinion should be revived. As the "Conclusion" section of this opinion reflects, that subject will be among those addressed at the next status hearing.

[7] Familiar Rule 56 principles impose on the movant the burden of establishing the lack of a genuine issue of material fact (*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986)). For that purpose this Court is called on to draw all "reasonable inferences, not every conceivable inference" in the light most favorable to the nonmovant (*DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 329 (7th Cir.1987)). Each cross-motion has been looked at in those terms.

At about 9 a.m. February 11, 1985[8] Officers met Willis at his place of employment and urged him to accompany them to police headquarters to aid the police in an investigation. Willis agreed and went with Officers to Area 3 Violent Crimes Police Headquarters at 39th and California. Shortly after Willis' arrival at Area 3 (about 1:30 p.m.) Jones prepared an arrest report on Willis. There was no warrant for the arrest.

Willis remained at Area 3 in the custody of Kukulka and O'Connor[9] until approximately 11 p.m. During that time Willis was placed in a series of lineups resulting in his identification by eight witnesses regarding seven separate sexual assaults. By 7 p.m. the lineups had concluded. At 9 p.m. an Assistant State's Attorney approved filing charges against Willis, and Kukulka immediately drafted the criminal complaints and felony minute sheets.

At 11:45 p.m. Willis was transported to the 9th District Police Station lockup and the police began to process him. At 4:15 a.m. February 12 the 9th District watch commander, or another police officer authorized by the

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[8] All further dates without year references will also refer to 1985.

[9] Bell and Jones drop out of the present story at this point. D.Mo. 1 n. 1 advises:

> By agreement of the parties, this motion for summary judgment is not presently being brought on behalf of Officer Ernest Bell or Officer A. Jones, Jr. These two police officers, as members of the Patrol Division, were solely arresting officers, who were not responsible for the conditions of plaintiff's detention after arrest. When plaintiff was taken into custody, he was turned over to Area 3 detectives T. O'Connor and Leonard Kukulka, who, as members of the Detective Division, were responsible for plaintiff's detention. The parties are attempting to reach an agreement regarding dismissal of Patrol Officers Bell and Jones. Should such an agreement not be reached, defendants reserve the right to bring a motion for summary judgment on behalf of Bell and Jones.

watch commander, approved the charges against Willis. That concluded the processing.

Instead of Willis being taken to court at that point (a subject dealt with a bit later in this factual summary), Willis remained in police hands for different purposes. Early in the afternoon of February 12 he was moved from the 9th District lockup to Area 2 Violent Crimes Police Headquarters to allow the Area 2 officers to place Willis in another series of lineups—this time relating to the investigation of other sexual assaults—that the police scheduled for 8 p.m. that evening. No arrest warrant had been issued against Willis for those crimes either.

No Area 2 lineups were ever conducted, because the police were unable to locate enough men fitting Willis' general description. Thus the only witness the police summoned to Area 2 viewed a photographic rather than corporeal lineup and was unable to identify Willis. No charges against Willis resulted from the Area 2 investigation. Willis was returned to the 9th District lockup some time after 9 p.m. February 12.

On February 13 Willis had a bond hearing. Bond was set at $300,000. Willis could not post bond and remained in custody. Later that day a grand jury indicted Willis for four sexual assaults.

Chicago Police Department ("Department") General Order ("GO") 78-1 establishes a general policy requiring that each arrestee be brought to court on the first available court date after the completion of processing. GO 78-1 ¶ VI.C.2 ("Paragraph C-2") recognizes an exception to that policy:

> 2. Extended Detention
>
> a. In the event Criminal Investigation Division personnel ascertain that there is a necessity for the detention of an arrestee for a period of time longer than that which might routinely be expected, in order

> that they may continue the investigation, a request for such detention will be made by the unit commanding officer or the area coordinator to the watch commander of the facility where the arrestee is detained.
>
> b. The watch commander will ordinarily honor such requests. . . .

There was in fact a 9:30 a.m. holiday court call on February 12.[10] Although the booking procedure on the Area 3 charges had been completed in plenty of time for Willis to appear at that February 12 court call, Willis was held past that call pursuant to Paragraph C-2. Indeed, he was not arraigned until February 13.

Conditions of Detention

Complaint Count I charges Kukulka and O'Connor with having violated Willis' Fourteenth Amendment due process rights by (1) not feeding him and (2) not allowing him to use the washroom during the 12-hour period that he was in their custody on February 11. This opinion will consider the first of those claims in detail, then turn briefly to the second.

Though Kukulka and O'Connor dispute Willis' claim that he was not offered nor did he eat any food during the entire time he was at Area 3, they recognize Willis' version must be accepted for current purposes. They contend they are nevertheless entitled to judgment as a matter of law because, they say:

> 1. There is no constitutionally protected right to food during a 12-hour detention period.
>
> 2. Even if such a right exists, Willis cannot show a deprivation of that right in violation of the Constitution.

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[10] Because February 12 was an official holiday (Lincoln's birthday), a special holiday court call schedule was in effect.

3. Willis cannot prove Kukulka and O'Connor intentionally deprived him of his rights.

4. Even if a constitutional violation did occur, Kukulka and O'Connor are entitled to qualified immunity.

Willis responds that resolution of the first three issues requires their presentation to a trier of fact and, as to the fourth issue, that qualified immunity is inappropriate in this setting. This Court agrees with Willis on both scores.

Donald v. Polk County, 836 F.2d 376, 379 (7th Cir. 1988) teaches that to prevail on a Section 1983 due process claim a plaintiff must prove [11] that (1) plaintiff held a constitutionally protected right, (2) plaintiff was deprived of that right in violation of the Constitution, (3) defendants intentionally caused the deprivation and (4) defendants acted under color of law. Of course Kukulka and O'Connor concede that they acted under color of law, so they direct all their energies toward refuting the existence of the first three factors.

They first urge this Court to find as a matter of law that 12 hours without food does not constitute a "genuine privation[ ] and hardship over an extended period of time" so as to implicate the Due Process Clause in the manner set out in *Bell v. Wolfish*, 441 U.S. 520, 542, 99 S.Ct. 1861, 1875, 60 L.Ed.2d 447 (1979). *Bell, id.* at 538, 99 S.Ct. at 1873 (citations omitted) focuses the constitutional evaluation of pre-trial detention conditions on the issue of punishment:

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[11] It is important to remember that in the context of defendants' Rule 56 motion it is really inaccurate to speak of what Willis must "prove." All he has to do to defeat summary judgment is to establish the existence of a genuine issue of material fact as to the issues he would have to prove at trial—and no weighing of the witnesses' credibility is permitted for that purpose.

> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. . . . Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."

While deprivation of food for 12 hours may not strike defendants as particularly harsh,[12] no legitimate governmental purpose has been (or could be) offered as justification for that deprivation. Certainly the trier of fact could reasonably find the deprivation of food here was intentional and calculated to punish Willis. Such a conclusion finds theoretical support in another area of constitutional jurisprudence: determinations of the voluntariness of consent to search and seizure under the Fourth

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[12] Willis' counsel correctly point out that the deprivation of food throughout the 12 hours that Willis was in the actual physical custody of Kukulka and O'Connor significantly understates the factual picture to be presented to the trier of fact in two respects:

1. Because the Officers picked up Willis at his job at 9 a.m. February 11, Kukulka and O'Connor knew that at least two hours (and in all likelihood more) had to be added at the front end of the period to the total time Willis was compelled to go without food.

2. Kukulka and O'Connor also knew that once Willis was transported to the lockup, Police Department policy would provide him with food before next morning's breakfast only upon his request (and they did not inform him of *that* fact so that he would be aware of the need to make such a request).

Thus the food deprivation ascribable to Kukulka and O'Connor could be viewed by the factfinder as substantially more protracted than the 12 hours during which Willis was actually in their hands. Relatedly, their failure to advise him of the need to make the request after he left their custody might rationally be perceived by the factfinder as evidence of an intent to punish him by the entire protracted deprivation of food.

Amendment.[13] In that context *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973) and like cases have looked to the totality of circumstances surrounding the consent and have identified "the use of physical punishment such as the deprivation of food or sleep" as one factor to be considered in deciding voluntariness. If deprivation of food can be characterized as punishment for that purpose, it may rationally be viewed as punitive in the present setting as well.

As a fallback position if they were to lose on the basic due process right-not-to-be-deprived-of-food issue (as they just have), Kukulka and O'Connor say that Willis will be unable to make the second *Donald* showing—that Kukulka and O'Connor intentionally infringed that right in violation of the Constitution.[14] They offer no cogent support for that mystifying contention. After all, if a trier of fact credits Willis' story sufficiently for him to get past the first hurdle, the second poses no other (or greater) difficulty. Once it has been established that extended deprivation of food *can* constitute intentional due-process-violative punishment (the *Bell v. Wolfish* standard) the second *Donald* step is simply to show that the alleged deprivation and intent were in *fact* present.[15]

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[13] As always, this opinion adheres to the conventional and convenient (though technically imprecise) practice of referring to the Fourth Amendment's underlying Bill of Rights provision (which of course imposes limitations only on the federal government) rather than to the Fourteenth Amendment (which applies to state actors and has been construed to embody such Bill of Rights guarantees).

[14] Throughout this and the following discussion, all references to "intent" should be read with recognition that "deliberate indifference" has regularly been treated as permissibly creating the inference that the prohibited intent was present (see, e.g., *DeShaney v. Winnebago County Department of Social Services*, —— U.S. ——, 109 S.Ct. 998, 1005 n. 5, 103 L.Ed.2d 249 (1989) and cases cited there).

[15] Kukulka and O'Connor erroneously conflate the first two *Donald* issues by invoking *Wilkins v. May*, 872 F.2d 190, 195 (7th

Kukulka and O'Connor launch still another direct attack on Willis' detention condition claim: They contend that because Willis cannot specifically identify any officer from whom he requested food, he cannot prove Kukulka or O'Connor intentionally deprived him. They seek to link that absence of identification with the statement in *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983) (emphasis in original) that "[a]n *individual* cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation."

What Kukulka and O'Connor gloss over (or ignore entirely) is that this is not at all a vicarious-responsibility claim of the type rejected in *Wolf-Lillie*. They were *personally* in control of Willis throughout the extended period of food deprivation. They were *personally* aware that the 12-hour period in their custody had been preceded by another indeterminate but substantial number of hours during which Willis had not had access to food. They were *personally* aware of the limitations on Willis' obtaining food once he was transported to the lockup, further extending the period of deprivation—and they *personally* did not advise him of those limitations. If a trier of fact were to find in that factual matrix that Kukulka and O'Connor intentionally withheld offering sustenance to Willis during the 12 hours he was in their custody and did so with punitive motives, they assuredly "caused or participated in" the constitutional deprivation regardless of whom Willis asked for food during that interval (or for that matter whether he asked at all).

Of course, at trial the factfinder could determine instead that Kukulka's and O'Connor's lack of attention to the conditions of Willis' detention was merely negligent and thus not in derogation of Willis' due process rights

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Cir.1989) to impose a separate "shocks the conscience" test at the second step. *Wilkins* rather employed that standard at the first step, to define the nature of the constitutional right to be free from severe bodily or mental harm.

(*Daniels v. Williams*, 474 U.S. 327, 335-36, 106 S.Ct. 662, 667, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S.Ct. 668, 670-71, 88 L.Ed.2d 677 (1986)). But if the factfinder's evaluation *were* one of intentional deprivation (or an equivalent deliberate indifference), the situation would be comparable in law to that held a Section 1983 violation in *Wood v. Worachek*, 618 F.2d 1225, 1233 (7th Cir. 1980).

Finally, Kukulka and O'Connor advance a last-ditch defense of qualified immunity from Willis' conditions-of-detention claim. On that score *Doe v. Bobbitt*, 881 F.2d 510, 511 (7th Cir.1989) has recently reconfirmed the principle that qualified immunity protects a public official from damages liability whenever the official's conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." To that end *Doe* cited *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) for the proposition that:

> While the very act in question need not have been held unlawful, the unlawfulness of the official's conduct must have been apparent in light of preexisting law.

Thus the current issue—given the need to draw all reasonable inferences in Willis' favor—is whether Kukulka and O'Connor objectively should have known that their intentional withholding of food from Willis in order to punish him violated a clearly established constitutional right. In light of (1) the preexisting firmly-established *Bell v. Wolfish* standard that *any* intentional imposition of a disability on a pretrial detainee, if not related to a legitimate governmental purpose, may equate to punishment and (2) the consistent recognition, in the closely analogous context of voluntary consents under the Fourth Amendment, that deliberate food deprivation amounts to physical punishment, that question really answers itself.

Lojuk v. Johnson, 770 F.2d 619, 628 (7th Cir.1985), as reconfirmed and quoted in *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.1988), strongly supports this conclusion:

> While cases involving the exact fact pattern at bar are necessary, case law in a closely analogous area is crucial to permit us to conclude that reasonably diligent government officials would have known of the case law, related it to the situation at hand, and molded their conduct accordingly.

Kukulka and O'Connor may (and in light of the above holdings *must*) argue to a trier of fact that they did not intentionally violate Willis' rights. But they cannot be heard to say that they did not know such an unjustified, intentional and protracted failure to provide a pretrial detainee with sustenance would violate his due process right to be free from punishment.

As for Willis' claim that he was deprived of use of the washroom during the same protracted period, the identical legal analysis clearly applies with equal force to that claimed deprivation. And once again genuine issues of material fact exist with respect to that claim. Accordingly the Kukulka-O'Connor motion for summary judgment on both Willis' conditions-of-detention claims is denied.

Length of Detention

City and Martin seek summary judgment on Willis' Count II length-of-detention claim, asserting:

> 1. Willis' claim against Martin in his official capacity should be dismissed as duplicative of the claim against City.
>
> 2. As a matter of law, City did not violate Willis' right to a prompt court hearing after his arrest.

Willis meets those contentions head-on, claiming:

1. Martin as well as City is a proper party to the Count II claim.

2. As a matter of law, City and Martin *did* violate Willis' right to a prompt court hearing following his arrest.

On the first (and substantively insignificant issue) Martin is right: Any official capacity claim against him is wholly redundant, calling for its dismissal. But on the second and substantive issue, this Court agrees with Willis: City violated his constitutional right to a prompt judicial hearing.

Jungels v. Pierce, 825 F.2d 1127, 1129 (7th Cir.1987) confirms the now familiar proposition that whenever a complaint names both a municipality and one of its officials sued only in his or her official capacity, "[a]ctually there is only one defendant—the City—not two." Because adding the official-capacity claim in the present situation "makes no practical difference" (*id.*), there is no reason to retain Martin as a party to this action. Consequently he is dismissed.

As for the cross-summary judgment motion on the merits of Willis' extended-detention claim, it requires no more than a brief review of the authorities to confirm just how solidly the established law favors Willis. Both on its face and as applied in this situation, Paragraph C-2 violated [16] Fourth Amendment standards by depriving Willis (and others held under like circumstances) of the right to be free from extended detention without determination of probable cause by a neutral and detached judicial officer.

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[16] Use of the past tense is in order here: This Court has been told by the parties that Department rescinded the extended detention policy of Paragraph C-2 in June 1986, after this Court's then colleague Honorable George Leighton held that provision unconstitutional in *Robinson v. City of Chicago,* 638 F.Supp. 186, 191-93 (N.D.Ill.1986), rev'd on other grounds unrelated to the merits (lack of standing), 868 F.2d 959 (7th Cir.1989).

Robinson, 638 F.Supp. at 191-93 considered the precise issue raised here and determined that Paragraph C-2 breached Fourth Amendment standards.[17] For that purpose *Robinson* relied on the holding in *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1973) "that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Robinson*, 638 F.Supp. at 192 (citation omitted) explained:

> Paragraph C-2 permits the exact type of extended detention which the Court in *Gerstein* found repugnant to Fourth Amendment rights. It specifically provides that an arrestee's detention be extended beyond the time when he would normally be sent before a magistrate so that police officers may continue the investigation. The reasoning behind this policy of extended detention is obvious; to build a case against a defendant while he is in jail. However, the teaching of *Gerstein* in this regard is clear—hoping to build a case is not a permissible reason for jailing someone indefinitely.

This Court is in full agreement with the reasoning and result of *Robinson* and, rejecting City's protestations, finds the same result must obtain here.

City argues it did not violate Willis' rights because it had probable cause to detain him for lineups as to other

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[17] Another of this Court's colleagues, Honorable Ilana Rovner, considered a similar issue and reached the same result in *Doulin v. City of Chicago*, 662 F.Supp. 318, 331-35 (N.D.Ill.1986), rev'd on other grounds unrelated to the merits (lack of standing), 868 F.2d 959 (7th Cir.1989). *Doulin* addressed the Fourth Amendment rights of misdemeanor arrestees and invalidated City's policy of holding such individuals for six hours pending fingerprinting. Though not on all fours with the case at bar, *Doulin* too offers an articulate exposition of the Fourth Amendment and lends support to the result reached here. Because *Robinson* is directly parallel to this case while *Doulin* is not, this opinion refers more directly to the reasoning in *Robinson*.

possible charges. The assertion betrays a basic misapprehension of *Gerstein*'s teaching. It is true that *Gerstein*, 420 U.S. at 120 & n. 21, 95 S.Ct. at 866 & n. 21 does (as City claims) identify the standards for determining probable cause to arrest. But *Gerstein* makes that statement only in the context of explaining why a nonadversary proceeding before a *judicial* officer—the neutral and detached magistrate—suffices for the probable cause determination required by the Fourth Amendment, rather than the formal adversarial procedures normally required in other criminal court proceedings. Nowhere does *Gerstein* say that merely because the standards are the same, the *police* can dispense with a probable cause hearing and make that determination themselves.

On the contrary, any such reading would fly directly in the face of the express edict in *Gerstein, id.* at 114, 95 S.Ct. at 863:

> Once the suspect is in custody . . . the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to the magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly.

Indeed, after particularizing such need, *Gerstein* went on to stress its ultimate holding—controlling here—not once but twice (*id.* and *id.* at 124-25, 95 S.Ct. at 868-69 (footnotes omitted)):

> Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.
>
> * * * *

> Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.

City also makes the related argument that the contemplated Area 2 lineups were part of "the administrative steps incident to arrest"—steps for which "a brief period of detention" is allowed under *Gerstein,* 420 U.S. at 113-14, 95 S.Ct. at 862-63. But investigating Willis' possible complicity in a set of crimes other than the ones for which he had been arrested simply does not qualify as an "administrative step incident to arrest." Willis was arrested, put in lineups, charged, booked and processed before 4:15 a.m. February 12. At that point the administrative incidents of his arrest were complete, and he should have been brought before a magistrate for a *Gerstein* probable cause hearing at the next available opportunity—9:30 a.m. February 12.

Instead, City's Paragraph C-2 called for Willis to be retained in custody without that constitutionally-compelled hearing, in the hope that a case could be built against him on a second set of crimes—all this while he remained in jail pursuant to a warrantless arrest on the first set of crimes. Under *Llaguno v. Mingey,* 763 F.2d 1560, 1567-68 (7th Cir.1985) that kind of fishing expedition cannot justify such extended detention without a hearing before a magistrate.

Indeed, the facts make it all too plain that Willis' situation presented none of the exigencies that might arguably provide justification for the police's arrest and processing of a suspect on the strength of the police's own determination of probable cause. Bringing Willis to the 9:30 a.m. February 12 court call would *not* have posed any impediment to placing him in the Area 2 lineup scheduled for

8 p.m. that evening. City's police personnel could readily have asked the magistrate to make a determination as to probable cause on the initial set of crimes, while at the same time presenting to the magistrate the facts that led the police to believe they had probable cause to detain Willis further on the other offenses as well. That course of action would have afforded full protection to Willis' liberty rights without in any respect impeding City's efforts to control crime—thus striking the balance contemplated by *Gerstein* and its progeny.

Finally, City urges that because Willis was unable to post the $300,000 bond that the magistrate ultimately set on the original aggravated assault charges, his claim must fail for lack of causation. City did not cause any deprivation of liberty without due process, the argument goes, because even if Willis had been brought to Court on February 12 he would have remained in detention at Cook County Jail after his hearing.

That "no harm, no foul" contention fails for two reasons. First, while *Donald*, 836 F.2d at 380-81 does hold that delay in holding a hearing causes no harm where a timely hearing would have led to the same result,[18] the selfsame opinion (*id.*) makes it plain that its teaching applies only where the delay in question was justified. This opinion has already explained that *no* justification existed for the delay in this case. Second, Willis here relies on his procedural due process right to a swift probable cause hearing before a magistrate—and on that score *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed.2d 252 (1978) (citations and footnote omitted) holds directly:

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[18] Defendants proffered a related but slightly different "no harm, no foul" argument in their first summary judgment motion. That argument also failed—but due to shortcomings other than those discussed here (Opinion at 387).

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

Thus the Supreme Court has explicity rejected the "no harm, no foul" argument in the procedural due process context [19]—and the Court of Appeals' ruling in *Donald* cannot of course be read as overriding that Supreme Court holding.

All this has, of course, spelled defeat for City's summary judgment motion. But it has done more. On each of the issues discussed in this section, the answer is the same even if all reasonable factual inferences are drawn in City's favor rather than in Willis' favor. Thus there are no material factual issues on Willis' countermotion under Rule 56.

In summary it must be concluded that City, by applying the policy set out in former Paragraph C-2,[20] detained Willis beyond the time needed to perform the administrative steps incident to his arrest. By doing that, instead

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[19] That holding in *Carey* was reconfirmed in *Memphis Community School District v. Stachura*, 477 U.S. 299, 308 n. 11, 106 S.Ct. 2537, 2543 n. 11, 91 L.Ed.2d 249 (1986).

[20] City makes a lame attempt to argue it did not have a policy of detaining individuals in the absence of probable cause. That of course is beside the point. What is relevant is that in constitutional terms, *Gerstein* teaches that after the time required for truly administrative processing, a police determination of probable cause simply does not suffice and the arrestee promptly must be brought before a magistrate for such a determination. Paragraph C-2 clearly embodies the official policy sanctioning extended police detention without such a judicial determination, and that suffices for municipal liability under Section 1983.

of bringing Willis before a magistrate, City violated his procedural due process rights. Willis is entitled to a judgment on Count II as a matter of law.

Conclusion

Kukulka's and O'Connor's motion for summary judgment on Count I and City's motion for summary judgment on Count II are denied. As to Count II, no genuine issue of material fact exists and Willis is entitled to a judgment as to liability as a matter of law.

Those rulings leave open for resolution by trial:

1. all issues bearing on Count I and
2. the issue of damages on Count II,

and there also remains for consideration the effect of *Viens* on the prior rulings in the Opinion. This action is set for a status hearing at 9 a.m. December 22, 1989 to discuss all those remaining matters.

APPENDIX

Willis originally sued former Chicago Police Superintendent Fred Rice ("Rice") as one of the co-defendants in this action. D.Mem. 1 n. 2 then urged the substitution of Martin for Rice:

> Former Superintendent Fred B. Rice, Sr. was sued in his official capacity in this case. This Court may take judicial notice that the Superintendent of Police for the City of Chicago is now LeRoy Martin. Therefore, pursuant to Fed.R.Civ.P. 25(d)(1), LeRoy Martin is automatically substituted as a party.

Initially P.Ans.Mem. 1 n. 1 rejected that position:

> The Defendants assert that because Rice is no longer the Superintendent of Police for the City, LeRoy Martin, the current Superintendent, should be substituted as a party. However, the policy being challenged in this suit was apparently rescinded prior to Rice's resignation and Martin's appointment. *Robinson v. City of Chicago*, 868 F.2d 959, 962 (7th Cir. 1989). In *Heller v. Bushey*, 759 F.2d 1371 (9th Cir.1985), rev'd and remanded on other grounds *sub nom. City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986), the Ninth Circuit ruled with respect to a similar claim that "[t]he proper individual defendants in this action are those officials who were in office before or at the time Plaintiff was arrested and who may have adopted a plan or policy authorizing or approving the unconstitutional conduct." Under this principle, Rice, who was Superintendent at the time of Willis' detention and who was responsible for the Chicago Police Department policies then in effect, remains a proper defendant in this suit.

That view later changed—a change confirmed both by D.R.Mem. 1 n. 1:

> Although plaintiff previously maintained that Fred Rice is still a proper party to this action, defense counsel received a telephone call from plaintiff's counsel on October 12, 1989, in which plaintiff's counsel stated that plaintiff will agree to the substitution of the present Superintendent Leroy Martin in place of the former Superintendent Fred Rice,

and by Willis' request for summary judgment against Martin rather than Rice in Willis' simultaneously filed P.R.Mem. 13. That moots the contention quoted earlier from P.Ans.Mem. 1 n. 1, and this Court has therefore ordered the automatic substitution of Martin for Rice.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 86 C 9589

MACEO G. WILLIS, JR.,
Plaintiff,

vs.

LEONARD KUKULKA, *et al.*,
Defendants.

Chicago, Illinois
May 29, 1991
9:15 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MILTON I. SHADUR, JUDGE

APPEARANCES:

For the Plaintiff:
MR. MICHAEL F. BRAUN

For the Defendant:

MS. DIANE J. LARSEN and
MR. DONALD ZOUFAL

* * * *

[2] THE CLERK: Case No. 86 C 9589, Maceo Willis vs. Leonard Kukulka, status.

MR. BRAUN: Good morning, your Honor. Michael Braun on behalf of plaintiff Maceo Willis.

MS. LARSEN: Good morning, your Honor. Diane Larsen for the defendants.

MR. ZOUFAL: Good morning, your Honor. Donald Zoufal, Assistant Corporation Counsel, on behalf of the City.

THE COURT: Good morning.

Well, let me first extend appreciation to both sides for having responded to the request that I made for your views on the effect of the post-jury-verdict decision by the Supreme Court in County of Riverside against McLaughlin, 59 United States Law Week 4413. They say that timing is everything, I guess.

(Laughter)

My reading of what you have submitted, and also of the opinion, and then going back as well to Gerstein against Pugh and to my own earlier opinion in Willis against Bell, tells me that each side prevails on one of the two issues that I identified in that memorandum order that I issued on May 15th. But the City's problem is that it wins on the issue that doesn't make a difference, while Mr. Willis prevails on the one that's determinative.

Let me deal first with the nondeterminative issue— [3] that is, the question of possible retroactivity of County of Riverside, to which I referred. Because County of Riverside and then my own supplemental opinion came so quickly after the jury verdict so that the City was effectively able to file what amounted to a timely Rule 59(e) motion, the judgment hadn't become final. And therefore the case law that the City's memorandum cites —principally our Court of Appeals opinion in that McKnight against General Motors Corporation, 908 F.2d 104—treats this as not being a question of retroactivity at all. And as a result I don't have to go through the sort of complicated Chevron Oil against Hewston three-part analysis, but I can proceed on the basis that County of Riverside does apply here.

As I suggested, though, on that score Willis has the better of it. In the City's memorandum it sort of misstates the issue by saying that there hasn't been any vio-

lation of the McLaughlin 48-hour bright-line rule. That bright-line rule that was announced there is an outside time limit. It defines what would be a violation in all events—that is, anything over a 48-hour detention. But it doesn't define what could constitute a violation in less than 48 hours in any sort of bright-line sense.

Interestingly, City itself urges in the context of the first issue—that is, the Chevron Oil analysis—and argues correctly that the County of Riverside majority insisted that [4] what it was doing was applying and not really overruling Gerstein against Pugh. If you take a look at the whole discussion in part III-A of the Supreme Court opinion—I don't know if you have had either Lexis or Westlaw, but I am working from Law Week, it's at pages 4415 and 4416—what the court did was to repeat the Gerstein principle that the probable cause determination can't be delayed unreasonably. In part what it said at page 4416 in part III-B of the opinion is this:

> "But flexibility has its limits; Gerstein is not a blank check. A state has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause. The Court recognized in Gerstein that a person arrested without a warrant is entitled to a fair and reliable determination of probable cause and that this determination must be made promptly."

So what it was doing was to repeat the Gerstein principle that a probable cause determination can't be delayed unreasonably, and then it gave among the examples of unreasonableness something that had been specifically identified by Gerstein. Here is what it said on that score (this is over on 4417):

> "This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate Gerstein if

> the arrested [5] individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence that justified the arrest . . ."

[And it goes on to give other examples.]

Now what the City's memorandum does on page 7—in a footnote—

MR. DAVY: Yes, your Honor. Footnote 3.

THE COURT: —footnote 3 on page 7—is to blur that holding. What the City argues is that Willis' arrest was justified. And that of course is quite true, but it's also quite beside the point. On that arrest the investigation had been completed in about whatever—12 to 14 hours. There were no procedural matters that remained in connection with that arrest. And with respect to those charges there was nothing of the kind permitted by the County of Riverside that remained to be completed.

What County of Riverside, for example, says there, still on page 4417—this is the end of part III-B:

> "Under Gerstein, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process—such as bail [6] hearings and arraignments—may be chosen. Even then, every effort must be made to expedite the combined proceedings."

There was nothing left to justify the City's failure to bring Willis before a judge for a probable cause determination on what was really being charged the very next morning at 9:30 as the City had ample opportunity to do. And so its failure on that score was unreasonable. You see, what's glossed over by the characterization, and what

it seems to me the City ignores is that what was involved during the remaining 24 hours was nothing more nor less than pretrial detention—not on the charges for which probable cause existed, but for other possible charges for which there was no probable cause. That violates Gerstein simpliciter, and it violates Gerstein as it has been explicated by County of Riverside.

Now if all of this sounds familiar to you, it ought to, because it is essentially the same analysis that informed my decision on the summary judgment motion against the City at 726 F.Supp. 1118. Willis was being held in custody under a Chicago Police Department general order that flat-out violated the Constitution as read in Gerstein, and as more recently read in County of Riverside. And my rereading of that earlier opinion in light of County of Riverside shows no basis for reconsideration, as the City's invited memorandum suggests. And I shouldn't be misunderstood as being critical—you know, I [7] really asked for a comment. And it seems to me that it was an important issue that required it. But I am denying City's Rule 59(e) motion.

Now remember that the timely Rule 59(e) deferred finality. Okay. So my denial today of the Rule 59(e) motion seems to me—you ought to take a look at this, but it seems to me that then creates the final order on the denial, and therefore you look at whatever your timetable is in light of that. Okay?

I do want to again extend appreciation to both sides for your submissions. Thank you.

MR. BRAUN: Thank you, your Honor.

MR. ZOUFAL: Thank you.

MS. LARSEN: Thank you.